Adsco Manufacturing Corporation *and* Local Lodge 1053, District Lodge 76, International Association of Machinists and Aerospace Workers, AFL–CIO *and* International Association of Machinists and Aerospace Workers. Cases 3–CA–17760 and 3–CA–17788

September 30, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On May 18, 1994, the National Labor Relations Board issued an Order[1] requiring the Respondent, Adsco Manufacturing Corporation, inter alia, to make whole all employees who were discharged in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, for loss of earnings and benefits suffered as a result of the Respondent's discrimination against them. On February 14, 1995, the United States Court of Appeals for the Second Circuit enforced the Board's Order in full.[2]

A controversy having arisen over the amount of backpay due, on September 13, 1995, the Acting Regional Director for Region 3 issued an amended compliance specification and notice of hearing alleging the amount due under the Board's Order. The Respondent filed an answer to the specification on October 2, 1995. On November 1, 1995, the General Counsel, the Respondent, and the Charging Parties filed with the Board a stipulation of facts. The parties agreed that the amended compliance specification, the answer, and the stipulation of facts constitute the entire record in this case. The parties further stipulated that they waived a hearing and the making of findings of fact and conclusions of law, and the issuance of a decision by an administrative law judge.

On February 7, 1996, the Board issued an order approving the stipulation of facts and transferring the proceeding to the Board. The General Counsel and the Respondent subsequently filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following findings.

I. FACTS

As set forth above, this compliance proceeding follows the Board's 1994 findings in the underlying unfair labor practice case that the Respondent violated Section 8(a)(3) and (1) by discriminatorily discharging several of its employees. In their stipulation of facts, the parties agreed that with respect to four of the discriminatees—Gerald Bennett, Dennis Jakiela, Donald Klee, and Raymond Unger—the Respondent's make-whole obligations will be satisfied by the payment of sums to each of them consistent with the relevant allegations in the amended compliance specification. Accordingly, there is no issue before us concerning these four discriminatees. With regard to the remaining four discriminatees—Angelo Broadbent, Robert Herbeck, James Lemke, and Gary Lutz—the sole matter to be decided is the termination point of these individuals' backpay periods.

The Respondent's view is that their backpay periods were terminated within a reasonable period of time after the Respondent sent a letter dated April 18, 1994, to each of them stating, in relevant part:

> In compliance with the NLRB decision, we are formally offering you employment in consideration of your skill and ability. Please call for an appointment immediately, to review your employment.

The General Counsel, consistent with the amended compliance specification, asserts that backpay for the four dicriminatees was not terminated until a reasonable period of time after the Respondent sent letters dated June 22, 1995, to each of them offering reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions. Should we find that the backpay period for each of the four was not terminated pursuant to the April 18, 1994 letter, it is not disputed that the Respondent's make-whole obligation to each of them ceased pursuant to the June 22, 1995 letter.

The parties agree that if each discriminatee's backpay period was terminated by the April 18 letter, the Respondent's obligations would be satisfied by the payment of backpay amounts specified in the stipulation of facts. The parties further agree that should we find that the backpay at issue was tolled by the June 22 letter, the Respondent's obligations would be satisfied by the payment of amounts set forth in the amended compliance specification.

II. ISSUE

The issue is whether the Respondent's April 18 letter terminated its make-whole obligations to discriminatees Broadbent, Herbeck, Lemke, and Lutz.

III. CONTENTIONS OF THE PARTIES

The Respondent contends that its April 18 letter to each of the discriminatees effectively offered reinstatement to his former job in a manner which was specific, unequivocal, and unconditional. The Respondent relies primarily on the letter's reference to its compliance with the Board's 1994 unfair labor practice deci-

[1] The unpublished Order issued pursuant to Sec. 102.48(a) of the Board's Rules and Regulations.

[2] *NLRB v. Adsco Mfg. Corp.*, No. 95–4007 (unpublished).

sion, which, inter alia, ordered the reinstatement of the discriminatees. Accordingly, the Respondent argues that its backpay obligations properly ceased with the discriminatees' failure to respond to the letter.

The General Counsel contends that the April 18 letter did not terminate the discriminatees' backpay periods because it did not adequately specify that they were being offered reinstatement to their former positions or, if such positions no longer existed, to substantially equivalent ones, and because the letter effectively requires that they be interviewed for employment. The General Counsel also argues that the Respondent placed an improper condition on its offer by requiring the discriminatees to respond immediately.

IV. DISCUSSION

A reinstatement offer to a discriminatee must be specific, unequivocal, and unconditional in order to toll backpay. See, e.g., *Holo-Krome Co.*, 302 NLRB 452, 454 (1991), enf. denied on other grounds 947 F.2d 588 (2d Cir. 1991), rehearing denied 954 F.2d 108 (2d Cir. 1992); *L. A. Water Treatment*, 263 NLRB 244, 246 (1982); and *Standard Aggregate Corp.*, 213 NLRB 154 (1974). It is the employer's burden to establish that it made a valid offer of reinstatement to the discriminatees. *L. A. Water*, supra at 246–247. For a reinstatement offer to be valid, it must have sufficient specificity to apprise the discriminatee that the employer is offering unconditional and full reinstatement to the employee's former or a substantially equivalent position. *Standard Aggregate*, supra at 154.

The reference to "compliance with the NLRB decision" at the beginning of the April 18 letter implied to the discriminatees that the Respondent was acting pursuant to a remedial duty to reinstate them consistent with the law. However, this initial language is offset, and effectively neutralized, by subsequent phrasing in the letter. Thus, the offer of employment "in consideration of your skill and ability," and the request to "call for an appointment . . . to review your employment," establish an undertone which conveys that the Respondent is reserving discretion to dictate the nature of the employment being offered. Although this is a perfectly acceptable approach in normal employment circumstances, in the instant situation the Respondent was operating under a legal constraint because it had unlawfully discharged these discriminatees.[3] In sum, the letter did not unambiguously and specifically communicate to the four discriminatees that they were being offered unconditional reinstatement to their former positions. Because the letter was neither sufficiently "specific" nor "unequivocal," we need not reach the General Counsel's contention that the immediate-response requirement was an improper condition on the offer. The Respondent's April 18 letter did not toll its make-whole obligations to the four discriminatees, and the backpay periods continued to run until terminated by the Respondent's June 22 letter.

ORDER

The National Labor Relations Board orders that the Respondent, Adsco Manufacturing Corporation, Buffalo, New York, its officers, agents, successors, and assigns, shall make whole the individuals named below, by paying them the amounts following their names, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws:

Bennett, Gerald P.	$1,832
Broadbent, Angelo	10,103
Herbeck, Robert P.	5,685
Jakiela, Dennis M.	12,879
Klee, Donald C.	2,137
Lemke, James H.	5,948
Lutz, Gary E.	8,036
Unger, Raymond K.	978
TOTAL	$47,598

[3] The Respondent's characterization in its brief that the April 18 letter was an "offer on its face . . . for the same job and pay" implicitly concedes that the discriminatees' former positions continued to exist. Accordingly, there was no basis for further inquiry regarding what might have been a substantially equivalent position, a relevant inquiry only if the original position no longer existed. *Trustees of Boston University*, 224 NLRB 1385 (1976), enfd. 548 F.2d 391 (1st Cir. 1977).